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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920.

Original No.

**Petition of the Chicago, Rock Island & Pacific Railway
Company for a Writ of Prohibition or a Writ
of Mandamus Directed to the District
Court of the United States, North-
ern District of Ohio, Western
Division.**

To the Supreme Court of the United States:

The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and principal place of business in Chicago, Illinois, as ground for the relief prayed herein, says:

On October 22, 1914, Horatio C. Creith, a citizen and resident of Ohio, filed a creditor's bill in the District Court of the United States for the Northern District of Ohio, Western Division, against Toledo, St. Louis & Western Railroad Company, a resident and citizen of Indiana. The bill is entitled on the docket of the court: Horatio C. Creith, plaintiff vs. Toledo, St. Louis & Western Railroad Company, in equity No. 112.

The bill alleged that the defendant was indebted to plaintiff in the sum of \$10,711.00 for materials sold within six months prior to the filing of the bill, and that its lines of railroad from Toledo, Ohio, to East St. Louis, Illinois, were subject to the lien of two issues of mortgage bonds dated July 1, 1900, one of \$10,000,000. and the other \$6,500,000. and an issue of \$350,000. Equipment trust certificates dated Sept. 1, 1906. The validity of none of these securities is questioned; the order appointing a receiver authorized him to pay interest becoming due thereon. The trustee of the mortgages were not named as defendants.

The bill then alleged that on August 1, 1907, defendant issued \$11,527,000.00 of Collateral Trust Gold Bonds, maturing August 1, 1917, by a collateral trust deed to Central Trust Company of New York as Trustee, pledging as security therefor 64,800 shares of the preferred stock, and 144,200 shares of the common stock of the Chicago & Alton Railroad Company; that defendant defaulted on the first day of August, 1914, on the payment of interest then due on said bonds, which contained provisions that upon such default continuing for 90 days the Trustee upon his own initiative or upon request of the holders of a majority thereof, should declare the principal due and payable. The bill alleged the imminence of a declaration of default on said bonds and of a multiplicity of suits by creditors, in whose behalf as well as in behalf of plaintiff the bill was filed, and prayed for the appointment

of a receiver and an injunction against the prosecution of actions against the road without the order and permission of the court, and that all such parties be required to intervene therein and assert their claims; and that a Master be appointed to take an account and report to the court the amount, character, lien and priority of all claims against the road.

On the same day defendant filed an answer admitting all the allegations of the bill and joining in the prayer for a receiver.

On the same day an order was entered upon the bill and answer appointing Walter L. Ross, receiver, and Clarence Brown, attorney for the receiver, with the usual powers, and with special authority to pay interest becoming due upon the \$10,000,000.00 bonds of July 1, 1900, the \$6,500,000.00 of July 1, 1900, and the \$350,000.00 trust certificates of September 1, 1906. All persons were enjoined from prosecuting suits against the defendant without order and permission of the court and were required to intervene in said cause and assert their claims therein. Guy W. Kinney was appointed Special Master to take an account and to ascertain and report the amount, character, lien and priority of all claims and evidence submitted thereon. The receiver was directed to publish notice to the creditors that they should "within 60 days from the first publication of said notice, present their respective claims to him, duly verified, or that they file herein a bill of intervention, etc;" and that all creditors except

those holding claims upon which the receiver was ordered to pay the interest, and owners of claims for labor and supplies, who should fail to file their respective claims or bills of intervention within 60 days should be barred and not allowed to participate.

December 10, 1914, Edwin G. Merrill, R. Walter Leigh, H. V. Morton and Roberts Walker, as a committee under a protective agreement, dated August 3, 1914, in respect of defendant's Gold Bonds of 1917, filed a petition, to which a copy of the protective agreement was attached as an exhibit, showing that they were "vested under the terms of this agreement with the legal title to all the bonds and coupons which may at any time be deposited hereunder, and the depositors agree that the deposit of the said bonds and coupons, transfers, assigns and vests in the Committee complete and absolute title to the said bonds and coupons with the same force and effect as if the Committee were the absolute owner thereof;" and also that they were expressly empowered to sue on said bonds and coupons in their own names or in the names of the depositors under the agreement. The petition showed further that of the \$11,527,000.00 face value of the Gold Bonds of defendant of August 1, 1907, referred to in the bill, there were issued and outstanding \$6,480,000.00 of Series A and \$5,047,000.00 of Series B; the two series being distinguished in respect to the amount of interest, series A, bearing interest at four per cent from their date, August 1, 1907, until maturity, August 1,

1917, and series B, bearing interest at two per cent from August 1, 1907, until July 31, 1912, and four per cent thereafter until maturity, August 1, 1917. It was shown further that on December 5, 1914, \$4,340,000.00 of the series A and \$5,047,000.00 of the series B bonds had been deposited with and were owned by the committee under the protective agreement. The petition asked dismissal of the bill on the ground that the suit was collusive between plaintiff and defendant and in fraud of the rights of the owners of the 1917 bonds, and in the alternative and if the prayer to dismiss be not granted that the petition be treated as an intervening petition, and that petitioners be given judgment for the \$9,387,000.00 face amount of said bonds and interest.

The plaintiff Creith, on December 28, 1914, answered the petition of Merrill, et al., asserting in his answer that by filing the same, said petitioners had entered their appearance in the suit, and prayed that the petition be considered and held to be a petition of intervention, and that the Receiver be directed to defend against said bonds and that the same be ordered surrendered if found to be invalid.

On March 8, 1915, by leave of court, Merrill, et al., filed a dependent bill on behalf of themselves and other owners of the Gold Bonds of 1917, who might become parties, withdrew the petition filed December 10, and filed a motion for an order relieving their claims from the 60 days limitation, and a motion to consolidate said

two suits. May 27, 1915, the court denied the motion to consolidate and ordered the Bondholders' Committee made parties defendant with leave to file an answer and cross-bill, which they did August, 1915, preserving their objections to the suit and the order making them parties, and setting up their title, by deposit under the Protective Agreement, to \$10,295,000.00 of the \$11,527,000.00 Gold Bonds issued and outstanding, being all of the B bonds (\$5,047,000.00) and \$5,248,000.00 of the A bonds.

The \$5,047,000.00 par value B bonds and \$400,000.00 A bonds had been deposited with and transferred to the committee by the Chicago, Rock Island & Pacific Railway Company, the balance of the A bonds by other persons.

On March 5, 1917, Central Trust Company of New York, filed a cross bill as trustee under the collateral trust agreement of August 1, 1907, to foreclose the lien of the collateral trust bond holders on the shares of Chicago and Alton stock pledged by said agreement to secure said bonds.

On March 5, 1917, an order was made appointing Guy W. Kinney, Special Master, to take testimony upon the issues thus made up by the pleadings. A copy of the order is attached hereto. At that time the Chicago, Rock Island & Pacific Railway Company was not a party, or named as a party in any pleading.

At the beginning of the taking of testimony before

the Special Master on April 2, 1917, the appearances of counsel were formally noted by the master as follows:

"The Central Trust Co. of New York, Joline, Larkin and Rathbone, Esqs. (by Henry B. Poor, Esq. of counsel). Edwin G. Merrill, et al., Bondholders' Committee by Spooner & Cotton, Esqs. (by T. M. Gordon, Esq. of counsel).

Lawrence Maxwell, Esq., and J. P. Cotton, Esq. appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company and Mr. Cotton representing the "A" bonds."

On March 1, 1918, defendant filed by leave of Court a pleading entitled:

"Answer of Toledo, St. Louis & Western Railroad Company to the answer and cross-bill of Edwin G. Merrill, et al., and cross-bill of Toledo, St. Louis & Western Railroad Company." It admitted that certain directors and officers of the company had attempted to authorize on behalf of the company the execution of the series A and series B Gold Bonds of 1917, and the mortgage to the Central Trust Company, and that an aggregate of \$11,527,000.00 of said bonds had been delivered but alleged that the issue was void in that said directors and officers of defendant company had delivered said bonds to the Rock Island Co. as consideration for 63,800 shares of the preferred stock and 144,200 shares of the common stock of the Alton Railroad theretofore owned by the Rock Island Company, and that such action on the part of the directors was

ultra vires. It was further alleged that the price paid by defendant in its bonds for said stock was greatly in excess of the true value thereof; that Edwin Hawley a director and vice-president of defendant company, was personally interested in the transaction on both sides being an owner of some of the Alton stock which was sold to defendant; that said Edwin Hawley individually received a bonus or commission of \$193,000.00 in cash for his services in procuring the defendant to purchase said stock, and that the bonds were fraudulently issued.

There was no prayer for process against the Rock Island Company. It was alleged "that upon the beginning of the taking of said testimony before said special master, said The Chicago, Rock Island & Pacific Railway Company, under the authority of the order entered by this court on the 22nd day of October, 1914, to which order reference is hereby made, intervened and appeared by its counsel and entered its appearance herein, and from time to time, since said date, has, as the owner and holder of certain of said A bonds and as the owner and holder of all of said B bonds, by virtue of said order last mentioned, and of the said answer and cross bill of said Bondholders' Committee participated in the taking of testimony and in making objections and taking exceptions to testimony offered, and in making stipulations as to matters occurring during said hearing; that thereby said The Chicago, Rock Island & Pacific Railway Company has entered

its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein."

The prayer was as follows:

"Wherefore this defendant prays:

(a) That the answer and cross bill of Edwin G. Merrill, et al., as a Bondholders' Committee may be dismissed; that the alleged bonds described in said answer and cross bill be declared to be null and void and that said Edwin G. Merrill, et al., as a Bondholders' Committee and each and all of the owners and holders of said bonds be forever enjoined from enforcing or attempting to enforce any of said bonds or any of said interest coupons thereof against this defendant or its property and assets; and said Edwin G. Merrill, et al., as a Bondholders' Committee, The Chicago, Rock Island & Pacific Railway Company and each and all other owners and holders of said bonds be ordered to cancel and surrender said bonds and the interest coupons thereof and each and all of the same to this defendant.

(b) That in the event any of said A bonds are found to be valid obligations of this defendant, and that the holders thereof are good faith owners of same, that the court order, decree and adjudge that this defendant shall have and recover of The Chicago, Rock Island & Pacific Railway Company any and all sums which it may be by said order and decree required to pay to

such good faith bondholders if any, together with interest thereon.

(c) That the court take an accounting of the amount which this defendant has paid for and on account of the interest upon said A and B bonds in excess of the amount which it has received as dividends upon said Alton stock, and that it may have and recover from said The Chicago, Rock Island & Pacific Railway Company such excess amount with interest thereon.

(d) That The Chicago, Rock Island & Pacific Railway Company may be held to be a party to this suit and required to answer hereto within the time required by law, or failing so to do that the allegations hereof shall be taken as confessed by said The Chicago, Rock Island & Pacific Railway Company.

(e) This defendant further prays for all relief to which it may be entitled by reason of the premises."

The pleading and other pleadings not now material, were filed over objection of Central Trust Company, Trustee, and Edwin G. Merrill, et al., by an order of March 1, 1918. The solicitor for Creith, for the railroad and others, made proof of service of copies upon "The Chicago, Rock Island & Pacific Railway Company, Lawrence Maxwell, Solicitor," and on March 11, 1918, an order was entered, providing

"it is accordingly ordered that the Chicago, Rock Island & Pacific Railway Co., which, the court finds has heretofore entered its appearance

as a party to this suit, be accorded and allowed ten days from the date of the entry hereof within which it is required to reply to the said cross-bill of Toledo, St. Louis & Western Railroad Company, and to such, if any, of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree pro confesso against the Chicago, Rock Island & Pacific Railway Company may be entered on said cross-bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default, etc."

The Chicago, Rock Island & Pacific Railway Company filed the following motion to set aside said order:

"The Chicago, Rock Island & Pacific Railway Company, appearing solely for the purpose of this motion and not intending to submit itself to the jurisdiction of this court as a party to this suit, moves the court to set aside its finding in the order entered herein on March 11, 1918, that the Chicago, Rock Island & Pacific Railway Company has heretofore entered its appearance as a party to this suit and its order that in default of a reply to the cross-bill of the Toledo, St. Louis & Western Railroad Company and to the other enumerated pleadings, a decree pro confesso may be entered against it on said cross-bill and upon the other enumerated pleadings as in default; on the ground that the court was without jurisdiction to make said order, or over this defendant as a party to said cross-bill."

On November 13, 1919, the court filed an opinion, copy of which is hereto attached, and entered an order

giving the Rock Island Company twenty days within which to plead to the cross bill of the Toledo, St. Louis & Western Railroad Company and that in default thereof a decree pro confesso against The Chicago, Rock Island & Pacific Railway Company may be entered upon said cross bill of the Toledo, St. Louis & Western Railroad Company. Within twenty days to-wit, on December 3, 1919, The Chicago, Rock Island & Pacific Railway Company filed the following motion:

"The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and principal place of business in Chicago, not intending to waive, but insisting upon and renewing its claim that it is not a party to this suit and has not entered its appearance as a party and that the court is without jurisdiction over it as a defendant to the so-called cross bill of the Toledo, St. Louis & Western Railroad Company, filed herein on March 1, 1918, or at all, especially in respect of the pretended cause of action therein set up for the recovery of moneys from it, moves to dismiss so much of said cross bill as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Co. upon the ground that it is not suable in this suit or in this District upon said pretended cause of action, not being an inhabitant of the District or of the State of Ohio, and neither it nor the Cross Complainant being a resident of the District or State."

This motion is filed under protest in obedi-

ence to the orders of the court, entered March 11, 1918, and November 13, 1919, to avoid a judgment by default.

The Chicago, Rock Island & Pacific Railway Company has a good defense to said pretended cause of action of the Toledo, St. Louis & Western Railroad Company, and proposes if this motion is overruled, to plead without delay to the merits thereof, which it cannot do as a part of this motion without prejudicing the jurisdictional objections raised by the motion."

On April 15, 1920, the court overruled the motion in an opinion, copy of which is attached hereto, and entered the following order:

"This cause coming on to be heard upon the motion of the defendant, The Chicago, Rock Island & Pacific Railway Company, filed herein December 3, 1919, to dismiss so much of the cross bill of the Toledo, St. Louis & Western Railroad Company as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company, is heard and considered; and the court finds said motion not well taken and does overrule the same; to which the said defendant, The Chicago, Rock Island & Pacific Railway Company is allowed an exception, which is accordingly entered in its behalf.

The defendant, The Chicago, Rock Island & Pacific Railway Company is given until May 8, 1920, to answer the cross bill against it of the Toledo, St. Louis & Western Railroad Company.

John M. Killits, District Judge."

April 15, 1920.

Wherefore your petitioner, being without other adequate remedy, prays the court for a writ of prohibition directed to the District Court, commanding it to proceed no further against your petitioner upon said cross bill of Toledo, St. Louis & Western Railroad Company, or in the alternative for a writ of mandamus directing the court to vacate its orders in that behalf; and that an order be now entered by this court requiring said District Court, within a time to be fixed, to show cause why a writ of prohibition or of mandamus should not issue.

The Chicago, Rock Island & Pacific
Railway Company
[By] Lawrence Maxwell,

William L. Day, Its Attorney.
Joseph S. Graydon,
Of Counsel.

State of Ohio, Hamilton County, ss:

Lawrence Maxwell, being first duly sworn, says that he is familiar with the records and proceedings in said case in Equity No. 112, in the District Court of the United States, Northern District of Ohio, Western Division, and that the facts alleged in the foregoing petition are true as he verily believes.

Lawrence Maxwell.

Sworn to before me and subscribed in my presence this 28th day of May, 1920.

Robert E. Freer,
Notary Public, Hamilton County, O.

In the United States District Court, Northern District
of Ohio, Western Division.

No. 112. In Equity.

Entry.

Horatio C. Creith, Plaintiff,

vs.

Toledo, St. Louis & Western Railroad Company,
Defendant.

This 5th day of March, 1917, came on for hearing the motion of Jules S. Bache, et al., as a Stockholders' Protective Committee for an order appointing a Special Master herein, and upon considering said motion and the evidence offered in support of same, the court finds upon such evidence that a showing has been made of an exceptional condition herein requiring the appointment of a Special Master with the powers and duties hereinafter stated.

It is therefore ordered by the court that Guy W. Kinney be, and he is hereby appointed Special Master herein, with the following powers and duties, viz.:

1. Said Special Master shall take and report to the court, on or before July 15, 1917, evidence offered by any or all of the parties hereto upon the issues raised by the answer and cross bill of Edwin G. Merrill et al., as a Bondholders' Protective Committee, the answer of said Jules S. Bache et al., as a Stockholders' Committee to said answer and cross bill of said Edwin

G. Merrill et al., the answer of Horatio C. Creith to said answer and cross bill of said Edwin G. Merrill et al., the answer of the Western Union Telegraph Company to said answer and cross bill of said Edwin G. Merrill, et al., the cross bill of Central Trust Company of New York as Trustee, the answer of said Jules S. Bache et al., to said cross bill of said Central Trust Company of New York as Trustee, and the answer of the Western Union Telegraph to said cross bill of said Central Trust Company of New York as Trustee, the bill of intervention of the Western Union Telegraph Company, and also upon the bill of complaint of Horatio C. Creith, except in so far as the issues thereunder have been heretofore referred.

2. Said Special Master shall assign the times and places for the taking of evidence under this order, and shall give notice to the parties hereto, or their counsel, as to the particular hour and place he will begin to take testimony and said Master shall thereafter continue to take testimony from day to day, or adjourn the taking of testimony from time to time and from place to place, as said Master may order, notice of the time and place of such adjourned hearings to be given to the parties or their counsel, by said Master. Said Master is hereby authorized to take testimony at such places, either within or without the Northern District of Ohio, as said Master may deem necessary, proper and convenient.

3. Said Master shall himself, or by designation of

one or more competent persons, report stenographically, and transcribe in typewriting, the testimony of witnesses heard by said Master.

4. Said Special Master is hereby authorized to regulate the proceedings beforehand, and is given full power and authority to issue, or to have issued by the Clerk of the proper court, subpoenas for witnesses, to swear and examine witnesses, or have them examined in his presence, touching all issues raised by the pleadings mentioned in paragraph (1) one hereof, (subject to the exception therein stated), and he may require all books, vouchers and papers of every character, relevant to said issues, to be produced beforehand, and may issue or cause to be issued, subpoenas duces tecum.

5. For the purposes of determining whether he shall require answers to be given to the questions asked, and whether documentary evidence shall be produced and incorporated in his report, said Special Master shall have, and is hereby given, full power and authority to decide upon the competency, materiality and relevancy of testimony and evidence offered before him by any party hereto, and to require the giving or production of such evidence in accordance with his judgment as to whether same is competent, material and relevant to the issues in respect to which said Special Master is hereby ordered to take and report evidence, and said Special Master is hereby given full power and authority to enforce his rulings on such

matters in accordance with the equity rules and laws of the United States; all such rulings, however, shall be, and are hereby made subject to review by this court, and power to review, and if erroneous to correct, any and all rulings by said Master is hereby expressly reserved by the court.

6. Said Special Master shall, on or before July 15, 1917, report to this court a full and complete transcript of all testimony taken before him, attaching thereto all exhibits, or copies of all exhibits, offered or received in evidence on the hearings before said Master, and in order that all questions may be before the court on the coming in of the Master's report, said Master is directed to take answers to all questions, whether objected to or not, noting all objections, the reasons assigned therefor, the rulings of the Master on such objections and the exceptions to his rulings, on the record and generally to require answers to all questions unless it is clear that the proffered evidence is not pertinent or germane to the matter of the reference in any respect.

7. The motion of said Jules S. Bache et al., for reference, otherwise than is herein granted, is hereby overruled, without prejudice, however, to the right of said Jules S. Bache, et al., to renew same hereafter.

(Signed) John M. Killits.

In the District Court of the United States, for the
Northern District of Ohio, Western Division.

Equity No. 112.

Horatio C. Creith, Plaintiff,

vs.

The Toledo, St. Louis & Western Railroad Company,
Defendant.

Memorandum Opinion on Motion to Vacate Order of
March 11, 1918.

Killita, J:

By various answers and admendments to previous pleadings, and which were permitted by us to be filed in this court, March 1, 1918, the complainant, the defendant, The Toledo, St. Louis & Western Railroad Company, the defendant, The Western Union Telegraph Company, and the defendants, Jules S. Bache, et al., as a Stockholders' Protective Committee, demanded the bringing into this case as an additional defendant, of The Chicago, Rock Island & Pacific Railway Company for reasons in the several pleadings set forth. Service being had without the district upon counsel already of record in the case for The Chicago, Rock Island & Pacific Railway Company, upon proof thereof and a consideration of the record made, the court found that the Railway company had entered its appearance as a party to the suit. It was given ten days within which to reply to the several pleadings filed March 1, as above stated, or suffer a decree pro

confesso. Subsequently and in due time a motion was made by The Chicago, Rock Island & Pacific Railway Company, attempting to appear specially for that purpose, to vacate the findings and order of March 11, 1918. Without giving any consideration at this time to the insistence that the terms of this motion were such as to enter the general appearance of the railway company in this case, it is sufficient to say that we consider the motion not well taken. It appears from the record that in the taking of testimony on the original lines, there came a time when, clearly, the principals in the several trusts represented in this case by trustees as parties were separated into classifications whose interests in the final outcome of the required different and somewhat antagonistic treatments, wherefore The Central Trust Company and the Bondholders' Protective Committee, who shared the responsibility of protecting the bonds and the holders thereof, became charged with duties which promised to involve them in inconsistent attitude towards the contentions of the parties to this case who attempted to bring in the railway company. Should the court be compelled to find in the final submission of this case that The Chicago, Rock Island & Pacific Railway Company bore responsibility for the alleged frauds perpetrated in the issuing of the bonds in controversy here, there would necessarily arise an adverse interest in favor of the bona fide holders of such bonds against the mala fide holders thereof, when this possibility loomed on the

horizon in the taking of testimony, its significance seems to have been recognized by the Chicago, Rock Island & Pacific Railway Company, whereupon Mr. Lawrence Maxwell, whose relation as counsel to the company or his power to represent the railway company in the litigation seems not to be in dispute—entered into the taking of testimony. Without going into detail, the court finds that with great clearness he signified his position before the master as one there to protect the special interests in this litigation of the railway company. Assuming, only for the purposes of full consideration of this motion, that the contentions of the parties to the case attacking the bonds are correct, a full and equitable determination of their rights as well as the rights of the bona fide holders of these bonds could not be reached by the court unless The Chicago, Rock Island & Pacific Railway Company were made a party to the case.

We are clear, therefore, not only that the railway company in question has caused itself to be so represented in the taking of testimony in this case as to have made itself a party to the record, but that it should be held here as a party, subject to any order which the court may legitimately make herein.

For the time being it seems unnecessary to analyze the authorities upon this subject. Counsel have the benefits of the exhaustive briefs of their respective opponents.

John M. Killits, District Judge.

November 3, 1919.

In the District Court of the United States, for the
Northern District of Ohio, Western Division.

In Equity No. 112.

Horatio C. Creith, Plaintiff,

vs.

The Toledo, St. Louis & Western Railroad Company,
Defendant.

Memorandum.

Killits, J:

The motion of The Chicago, Rock Island & Pacific Railway Company to dismiss that part of the cross bill of The Toledo, St. Louis & Western Railroad Company which seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company we find not well taken upon the authority of Williamson vs. Collins, 243 Fed. 835; Caffisch vs. Humble, 251 Fed. 1; Howard vs. Leete, 257 Fed. 918, and other cases of similar character.

April 15, 1920.

